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No. 98-392

In The Supreme Court of the United States
October Term, 1998

Michael W. Walker, Aearth Development, Inc., Aearth Preparations, Inc., and Coal Processors, an Arkansas Joint Venture, Petitioners,

v.

First Commercial Bank, N.A., Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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REPLY BRIEF FOR PETITIONERS

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1. Respondent makes only a passing effort to respond to the merits of the petition. On that point, it argues that review is unnecessary because the unpaid franchise taxes did not accrue until after the bankruptcy case. Accordingly, it reasons that an action to recover the franchise taxes did not accrue "before the commencement of the case" for purposes of 11 U.S.C. § 362(a)(1). Br. in Opp. 5-6.

That argument is irrelevant. Revocation of a corporate charter during a bankruptcy proceeding violates a different provision of the Bankruptcy Code no matter when the debt arose. Section 362(a)(3) prohibits "any act to obtain possession

of property of the estate or of property from the estate, or to exercise control over property of the estate." Unlike Section 362(a)(1), nothing in that provision turns on the timing of the obligation. As we explain in the petition, revocation of a charter is an action exercising "control" over an asset of the debtor in violation of Section 362(a)(3). *See* Pet. 8-9. Furthermore, the decision of the Arkansas court on that question conflicts directly with the decision of the Ninth Circuit in *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association*, 997 F.2d 581 (1993). *See* Pet. 10-11. Respondent's brief in opposition to the petition cites neither Section 362(a)(3) nor *Hillis*.

Moreover, even with respect to Section 362(a)(1), respondent draws the wrong conclusion from the ambiguity in the record. The record in fact does not establish when the action for revocation accrued. It was respondent's burden to offer any relevant evidence into the trial record, but it failed to do so. *See* Ark. R. Civ. Proc. 9(a) (a party challenging capacity must plead the issue and establish the relevant supporting facts). Respondent cannot avoid the automatic stay simply by contending that on some other state of the record it might be possible for respondent to establish that one subsection of the statute does not apply.

2. The brief in opposition argues that petitioners somehow have waived a point that they consistently have been presenting to the Arkansas Supreme Court for years. In substance, the argument for waiver rests solely on the summary treatment of the issue in petitioners' principal brief on the merits of the case below. The issue in question was respondent's ninth point of appeal. 3 Appellant's Abstract and Brief 918-20. Under Arkansas law, capacity and standing are jurisdictional issues that are a prerequisite to the right to a jury trial. *Lineberry v. State*, 907 S.W.2d 705, 706 (Ark. 1995),

Jones v. American Home Life Ins. Co., 738 S.W.2d 387, 390 (Ark. 1987). Accordingly, it is clear that the Arkansas Supreme Court at least implicitly rejected respondent's arguments about capacity in its 1994 decision in petitioners' favor. Responding to that issue in the court below, petitioners took the logical position that the doctrine of law of the case obviated any further consideration of the issue. Appellees' Supplemental Abstract and Response Br. 68-69. *Cf., e.g., Montana v. United States*, 118 S. Ct. 1650, 1662 (1998) (discussing that doctrine under federal law).

We fail to see how an argument that a court already has decided an issue in our favor can be construed as an explicit or implicit waiver of the issue. Moreover, nothing in the 1998 opinion of the Arkansas Supreme Court suggests that it concluded that we have waived the argument. The Arkansas court's decision addressed the argument without mentioning waiver, basing its rejection of petitioners' position on the merits. The court did not treat petitioners as waiving an issue on which petitioners appear previously to have prevailed.

Finally, it is impossible to suggest that the lower court actually was unaware of the question at the time of its decision. After the question received sustained attention at oral argument, petitioner formally supplied the court with the briefs we had filed on the question on the earlier appeal, which discussed the automatic stay in detail. *See* Motion To Submit Capacity/Standing Briefing of Both Sides from Earlier Arkansas Supreme Court Appeal in This Case.

In sum, the question was before the lower court. The lower court was aware of the question. Nothing in the opinion of the lower court suggests a conclusion that petitioner waived the question. The question is properly before this Court for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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